Supreme Court, U.S.
FILED
JAN 7 - 2011
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179 (1)

No. 10-885

IN THE
# Supreme Court of the United States

ALEXIS WITT, ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
*Petitioner*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Feres v. United States*, 340 U.S. 135 (1950), this Court created a non-textual exception to the broad waiver of immunity enacted by Congress in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq.* The *Feres* doctrine, as that exception is called, bars active-duty military personnel from bringing claims against the government for injuries arising out of activity incident to service. Despite this Court's reaffirmance of the doctrine in *Johnson v. United States*, 481 U.S. 681 (1987), it remains unworkable. It has generated inconsistent and inequitable outcomes for more than 60 years, and lower courts regularly call for this Court to reconsider it.

The Question Presented is:

Should the *Feres* doctrine be overruled, in whole or in part, on the ground that the FTCA should not be construed to include a non-textual exception barring claims for injuries arising out of activity incident to service or, if there is such an exception, it does not bar a claim for injury to a service member caused by medical malpractice at a military hospital when the service member was on leave when admitted to the hospital?

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Alexis Witt, on behalf of the Estate of Dean Witt, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## INTRODUCTION

In *Feres v. United States*, 340 U.S. 135 (1950), this Court announced a judicial gloss on the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b), to bar tort claims against the government by active-duty military personnel injured incident to service. In *Johnson v. United States*, 481 U.S. 681 (1987), the Court reaffirmed the *Feres* doctrine in a 5-4 decision. Both before and after *Johnson*, the vague, ill-defined contours of the *Feres* doctrine have vexed lower courts seeking to apply this Court's precedent and generated an unprecedented outpouring of expressions of dissatisfaction from federal judges. This case presents the Court with an opportunity to revisit the *Feres* doctrine and to fashion a workable and more stable precedent faithful to Congress's intent.

In 1946, Congress enacted the FTCA as a broad waiver of sovereign immunity from tort liability for the negligent or wrongful acts of federal government employees. Although the FTCA contains a list of specific exceptions to this expansive waiver of immunity, *see* 28 U.S.C. § 2680, none expressly precludes all claims by members of the military. In fact, the only statutory exception that mentions military personnel creates a limited exception for "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* § 2680(j). Nonetheless, in *Feres*, this Court held that service members cannot bring claims against the government for injuries that "arise out of

or are in the course of activity incident to service." 340 U.S. at 146.

For the next 37 years, lower courts struggled to apply the *Feres* ruling without performing manifest injustice, often unsuccessfully. In 1987, by a 5-4 vote, this Court in *Johnson* reaffirmed the *Feres* doctrine without a single reference to the text of the FTCA and over a vigorous dissent by Justice Scalia. Now, nearly 25 years after *Johnson*, lower courts continue to struggle to apply the ill-defined doctrine while decrying its harsh results and calling for this Court to overrule *Feres*. This case presents the Court with an opportunity to reconsider *Feres* and *Johnson* and to end the inequities and confusion spawned by the Court's 60-year-old mistake.

## OPINIONS BELOW

The court of appeals' opinion (App. 1a–2a) is reported at 379 F. App'x 559. The district court's order (App. 3a–7a) is not reported.

## JURISDICTION

The court of appeals entered its judgment on May 14, 2010. A petition for rehearing was denied on August 11, 2010. App. 10a. On November 4, 2010, Justice Kennedy extended the time to file a petition for certiorari until January 7, 2011. App. 14a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves a judicially created exception grafted onto the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346 *et seq.* The pertinent provisions of the FTCA are reproduced at App. 11a–13a.

## STATEMENT

United States Air Force Staff Sergeant ("SSgt.") Dean Patrick Witt died as a result of egregious medical malpractice in a U.S. military hospital. SSgt. Witt's widow, petitioner Alexis Witt, brought this suit against the government on behalf of his estate.

In October 2003, SSgt. Witt was a healthy 25 year old on a protracted leave pursuant to a Permanent Change of Station Order. He was in the process of moving his family – his wife Alexis, daughter Hannah, and newborn son Noah – from Hill Air Force Base in Utah to Travis Air Force Base in California. While his family remained in Utah, SSgt. Witt transported his family's belongings to their new home.

Shortly after arriving in California, SSgt. Witt experienced severe abdominal pain. He sought treatment at David Grant Medical Center, the base hospital at Travis Air Force Base, where he was diagnosed with acute appendicitis. Twenty days before he was scheduled to report to his new commanding officer, SSgt. Witt underwent a routine appendectomy without incident or complications.

SSgt. Witt's post-operative care, however, was grossly negligent. While being moved from the operating room to the post-anesthesia care unit, SSgt. Witt exhibited signs of breathing distress and began turning blue. In response, the supervising nurse anesthetist attempted to ventilate SSgt. Witt with pediatric equipment, but the attempt was unsuccessful because the equipment was too small. She then attempted a direct endotracheal intubation, but it was later discovered that she had placed the tube in SSgt. Witt's esophagus rather than in his trachea,

thus completely depriving him of oxygen. During these failed attempts at resuscitation, the nurse anesthetist neglected to signal a "Code Blue," an act that would have called a resuscitation team to assist her in this emergency. Eventually, an M.D. anesthesiologist arrived and performed a second endotracheal intubation, which was successful. By then, SSgt. Witt had been deprived of oxygen for several minutes, causing a severe and permanent brain injury. SSgt. Witt lapsed into a coma. Less than three months later, "[a] 25 year old man who [had] devoted his life to serving his country" died "through no fault of his own." App. 6a.

The negligent care provided to SSgt. Witt is well documented. An independent expert reviewed SSgt. Witt's medical records and cited 19 separate breaches of the standard of care during his treatment. Upon investigation by the California Board of Nursing, the supervising nurse anesthetist responsible for SSgt. Witt's post-operative care admitted that she was guilty of gross negligence and/or incompetence and surrendered her license to the Board.

Petitioner's claims on behalf of the estate of SSgt. Witt were filed with and presented administratively to the United States Air Force on August 25, 2005, pursuant to 28 U.S.C. §§ 2672 and 2675(a). On March 7, 2008, the Air Force denied the claim. *See* App. 8a–9a. Petitioner filed this suit on August 28, 2008, in the United States District Court for the Eastern District of California. The government moved to dismiss for lack of subject matter jurisdiction, claiming that the suit is barred under *Feres* and its progeny.

The district court, granting the government's motion to dismiss, noted that "[t]he alleged facts in

the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that this Court should allow this claim in spite of *Feres*." App. 6a. Ultimately, the court concluded that, "as wrong-headed as it may seem, this Court is duty-bound to follow precedent" and apply the *Feres* doctrine to bar the claim. App. 7a. But the court went on to "encourage[] the Ninth Circuit to consider the *Feres* Doctrine en banc, especially in light of the inequitable result of its application in this case," and "further join[] in Judge Ferguson's plea to the Supreme Court . . . that now is the time to revisit the *Feres* doctrine." *Id.* "Reluctantly" reaching a conclusion that "can only be characterized as unfair and irrational," the court entered final judgment on February 10, 2009. App. 3a, 7a.

On appeal to the Ninth Circuit, petitioner argued that the plain language of the FTCA does not bar medical negligence claims by active-duty service members, particularly when on leave from military duty. Despite the district court's strong urging to reconsider the application of the *Feres* doctrine in the present case, the Ninth Circuit affirmed. *See* App. 1a–2a. The court of appeals stated that, "[a]lthough we acknowledge the tragic circumstances underlying this lawsuit, we are bound by precedent of the Supreme Court and our court to affirm the district court's dismissal." App. 2a.

## REASONS FOR GRANTING THE PETITION

*Feres* and *Johnson* have proven to be unstable and harsh precedents, engendering disrespect among lower courts, unfairness to military service personnel, and countless exhortations to this Court to reconsider the soundness of the doctrine. This case provides an ideal opportunity for this Court to overrule *Feres* and *Johnson* and to restore Congress's intent in the FTCA, as expressed in the statute's plain language and purposes.

### I. LOWER COURTS HAVE BEEN UNABLE TO APPLY THE ILL-DEFINED *FERES* DOCTRINE FAIRLY AND CONSISTENTLY, AND HAVE URGED THIS COURT TO RECONSIDER IT IN UNPRECEDENTED NUMBERS

Pursuant to *Feres* and *Johnson*, "the Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Johnson*, 481 U.S. at 692. That formulation is vexingly vague, and lower courts have struggled for more than 60 years to apply it fairly and consistently. Notwithstanding this Court's efforts to provide needed clarification in *Johnson*, the confusion and inequity created by the *Feres* doctrine have gotten worse, not better, in the 25 years since *Johnson* was decided. Because *stare decisis* "is a principle of policy and not a mechanical formula of adherence," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), adherence to precedent must yield to reasoned reconsideration when "the analytical underpinnings [of a holding are] substantially weakened," *State Oil Co. v. Khan*, 522 U.S. 3, 14 (1997), and when "a precedent [is] a positive detriment to coherence and consistency in the law . . . because of in-

herent confusion created by an unworkable decision," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); *see also Board of County Comm'rs v. Brown*, 520 U.S. 397, 431 (1997) (Breyer, J., dissenting) ("[L]ater law had made the original distinction, not simply wrong, but obsolete and a potential source of confusion.") (collecting cases that have reexamined prior statutory interpretations). Because of the problems created by continued adherence to *Feres* and *Johnson*, this Court should grant certiorari to revisit those precedents.

### A. Courts Of Appeals Have Created Inconsistent Tests For Applying *Feres*

Because the *Feres* bar is a judicially created exception to the FTCA expressed in imprecise terms and based on evolving and unpersuasive policy considerations, lower courts are left with little guidance in applying it. The *Johnson* Court's attempt to solidify the doctrine failed to provide meaningful direction, and interpretive difficulties continue to plague the lower courts. *See Taber v. Maine*, 67 F.3d 1029, 1043 (2d Cir. 1995) ("[I]t is not surprising that *Johnson* – a decision that we are bound to follow – left both the doctrine and the lower courts more at loose ends than ever.").

The Ninth Circuit, for example, has abandoned attempts to apply the *Feres* doctrine by reference to its original justifications, noting that it is "unclear which of the doctrine's original justifications survive." *Persons v. United States*, 925 F.2d 292, 295 (9th Cir. 1991). Instead, the Ninth Circuit has developed a four-factor test to determine whether *Feres* bars a particular suit. *See Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007). The relevant factors are: "(1) the place where the negligent act occurred;

(2) the plaintiff's duty status when the negligent act occurred; (3) the benefits accruing to the plaintiff because of his status as a service member; and (4) the nature of the plaintiff's activities at the time the negligent act occurred." *Id.*; *see also McConnell v. United States*, 478 F.3d 1092, 1095 (9th Cir. 2007). Under this test, "none of these factors are dispositive," *McConnell*, 478 F.3d at 1095, and the court focuses on the "totality of the circumstances," *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2002). In reality, however, judges in the Ninth Circuit apply the *Feres* doctrine by engaging in ad hoc factual analogies with prior precedents. *See, e.g.*, *Schoenfeld*, 492 F.3d at 1019 ("Despite this framework, our *Feres* jurisprudence is something of a muddle. . . . Therefore, we now examine 'the Ninth Circuit cases that are most factually analogous to the case at bar to determine whether the *Feres* doctrine bars [plaintiff's] suit.'") (quoting *Dreier v. United States*, 106 F.3d 844, 849 (9th Cir. 1996)); *see also McConnell*, 478 F.3d at 1095 n.3 ("'[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases.'") (quoting *Costo*, 248 F.3d at 867).

Other courts of appeals take the opposite approach, assessing the facts in each case in light of the three policy factors identified by the *Johnson* majority as justifications for the Court's reaffirmance of its *Feres* construct. For example, the Fourth Circuit evaluated the nonfederal nature of the parties' relationship, the unavailability of alternative government benefits, and the fact that resolution of the medical malprac-

tice suit was unlikely to unduly interfere with military discipline or require the court to second-guess military decision-making before permitting an active-duty service member to sue the government for injuries suffered by her infant son due to negligent prenatal care. *See Romero v. United States*, 954 F.2d 223, 226 (4th Cir. 1992). The Sixth Circuit engaged in a similar analysis to conclude that *Feres* does not bar a medical malpractice claim by an active-duty service member for the injury caused to her gestating child by her doctor's failure to prescribe prenatal vitamins. *See Brown v. United States*, 462 F.3d 609, 613 (6th Cir. 2006) ("[N]one of the three considerations typically invoked to support application of the *Feres* doctrine seems to apply with particular force in the case of a servicewoman seeking prenatal care in anticipation of or during pregnancy.").

Still other courts of appeals, such as the Seventh and Tenth Circuits, ignore the rationales underlying the *Feres* doctrine and attempt to resolve service members' claims by holistically assessing whether the service member's injury occurred "incident to service." *See, e.g., Maas v. United States*, 94 F.3d 291, 295 (7th Cir. 1996) ("Application of the *Feres* doctrine does not depend on the extent to which its rationales are present in a particular case. Rather the test is whether the injuries are based on 'service-related activities.'") (citation omitted); *see also Purcell v. United States*, 137 F. App'x 158, 159–60 (10th Cir. 2005) ("Recent decisions have made it clear that the overarching question under *Feres* is whether the plaintiff's injury was 'incident to service,' regardless of the presence of any 'special factors' potentially implicating or undermining the legal rationales historically advanced for the doctrine."); *Tootle v. USDB*

*Commandant*, 390 F.3d 1280, 1282 (10th Cir. 2004) ("Rather than focusing on the presence or absence of the *Feres* rationales . . . the relevant question is whether [plaintiff's] alleged injuries arose 'incident to service.'").

In some circuits, the "incident to service" inquiry has given rise to its own set of multi-factored tests, essentially divorced from the rationales underlying the *Feres* bar. The First Circuit, for example, determines whether an injury is incident to service by "asking whether it occurred on a military facility, whether it arose out of military activities or at least military life, whether the alleged perpetrators were superiors or at least acting in cooperation with the military, and . . . whether the injured party was himself in some fashion on military service at the time of the incident." *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 682 (1st Cir. 1999) (citations omitted). The Fifth and Eleventh Circuits have adopted similar, but not identical, tests for determining whether an injury is incident to service. *See Speigner v. Alexander*, 248 F.3d 1292, 1298 (11th Cir. 2001) ("We apply a three-part test to determine whether an injury is incident to service. When undertaking such an analysis, we consider, (1) the duty status of the service member, (2) the place where the injury occurred, and (3) the activity the serviceman was engaged in at the time of injury.") (internal quotation marks omitted); *Schoemer v. United States*, 59 F.3d 26, 28 (5th Cir. 1995) ("*Feres* applies if the serviceman's injury was incident to military service. We examine the totality of the circumstances to determine whether a serviceman's injury was incident to military service. In particular, we consider: (1) the serviceman's duty

status; (2) the site of his injury; and (3) the activity he was performing.") (citations omitted).

### B. The Inconsistent Tests Developed By The Courts of Appeals For Applying *Feres* Generate Irreconcilable And Inequitable Results

Not surprisingly, the various tests that the lower courts have adopted in their attempts to apply the imprecise *Feres* bar have generated a plethora of irreconcilable outcomes. These inconsistencies highlight the failure to achieve one of the *Johnson* Court's stated justifications for affirming the *Feres* doctrine – the need for uniformity. *See* 481 U.S. at 689. Moreover, the divergence in outcomes among essentially indistinguishable cases undermines the integrity of the entire doctrine.

1. The infinitely malleable "incident to service" standard has led lower courts into an unnavigable morass in attempting to apply *Feres* to new circumstances. For example, courts struggle to determine whether infant children of military personnel injured by negligent prenatal care are barred by *Feres* from suing the government for their injuries, and the cases generate divergent results, even within the same circuit. The Sixth Circuit has held that *Feres* both *does* and *does not* bar suit by civilian children for injuries they suffered as a result of negligent prenatal care given to their active-duty service-member mothers. In *Irvin v. United States*, 845 F.2d 126 (6th Cir. 1988), the court held that *Feres* barred a claim based on negligent prenatal care to a member of the military that resulted in the premature birth and consequent death of her daughter. In *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006), the court permitted a father to sue the government for injuries

sustained by his infant daughter as a result of negligent prenatal care of her service-member mother. Although the *Brown* panel attempted to distinguish the cases based on the type of negligent prenatal care at issue, *id.* at 615, the outcome of the cases defies reason.

The Fourth Circuit also permitted active-duty military parents to sue the government for negligent prenatal care that resulted in their son's premature birth and cerebral palsy. Although noting that the appropriate prenatal care would have involved medical treatment applied directly to his mother's body, the court nonetheless held that *Feres* did not bar suit because "the purpose of the treatment was to insure the health of a civilian, not a service member." *Romero*, 954 F.2d at 225. The *Romero* court's conclusion that the injured dependent's claim was not *Feres*-barred meant that his parents, both active-duty service members, could sue the government for the consequential damages they suffered as a result of their child's injury. *See id.* ("The government conceded at oral argument that if [the child's] claim is not *Feres*-barred, the claim of his parents . . . likewise is not barred. We agree. It is obvious that active duty service persons may recover consequential damages for non-physical injury they sustain as a result of injury to a civilian dependent."). Thus, although the mother in *Romero* would not be able to sue the government if she were injured by negligent prenatal care, she would be permitted to sue *for her own injuries* if they were consequential to injuries suffered by her unborn child as a result of the very same negligent prenatal care.

In contrast to the Fourth Circuit's reasoning in *Romero*, the Fifth Circuit has rejected claims by

children injured by negligent prenatal care because "[t]he treatment accorded [the] mother is inherently inseparable from the treatment accorded [the plaintiff] as a fetus in his mother's body." *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982).

Even within the same *case*, a circuit has reached inconsistent and irrational outcomes applying *Feres*. In *Del Rio v. United States*, 833 F.2d 282 (11th Cir. 1987), a service-member mother sued the government for negligent prenatal care that led to the premature birth of her twin sons. From that negligent care, the mother and one son suffered serious personal injuries, and the other son died. The service member sought damages for her own personal injuries, as guardian of her infant son for his injuries, and as representative of her deceased son's estate for his death. The court held that the mother's personal injury claim was barred by the straightforward application of *Feres*, that the surviving son's claim could proceed because the maintenance of that claim "will not circumvent the purposes of the FTCA," and that the mother's claim as representative of her deceased son's estate was barred by *Feres* because it sought to hold the government liable for a direct injury to the mother. *Id.* at 287–88.

The courts of appeals resolving these prenatal care cases are fully aware that their decisions contribute to an illogical patchwork of rulings. *See Romero*, 954 F.2d at 226–27 ("We think the facts of *Scales* and *Irvin* are distinguishable from the instant case, but to the extent that their reasoning may not be distinguishable, we simply disagree."); *see also Mossow v. United States*, 987 F.2d 1365, 1370 n.11 (8th Cir. 1993) ("[W]e follow the Fourth Circuit in stating that

to the extent the reasoning in *Irvin* and *Scales* applies to the case before us, we disagree.").

The outcomes in *Del Rio* and *Romero* cannot be reconciled with any coherent view of the policy considerations that might have led this court to reaffirm *Feres* in *Johnson*. And the complete randomness within the *Del Rio* opinion and among the *Feres* prenatal care cases in general cannot be tolerated by a judicial system built upon the rule of law.

2. Confusion generated by the vague *Feres* standard extends far beyond the prenatal care context. Courts also struggle to determine whether a service member injured during purely recreational activities marginally related to military service may sue the government for compensation, again with irreconcilable results. In *Costo*, for example, the Ninth Circuit held that an active-duty service member who was killed during a recreational rafting trip sponsored by the Navy's Morale, Welfare and Recreation ("MWR") program could not pursue a tort claim against the government. Although the plaintiff was off-duty when injured and the off-base rafting trip was led by civilian guides, the Ninth Circuit found the injury "incident to service" because the rafting trip was a benefit available to the plaintiff only by virtue of his military status and during it he was subject to military orders and discipline. *See* 248 F.3d at 867; *see also Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986) (barring suit by an active-duty service member on liberty who was injured while operating a canoe rented from the Navy Special Services facility in San Diego).

In contrast, in *Regan v. Starcraft Marine, LLC*, 524 F.3d 627 (5th Cir. 2008), the Fifth Circuit permitted a tort action by an active-duty service member who

was injured on a pontoon boat rented from a civilian company licensed to operate at the Army's MWR facility in Toledo Bend. The court held that his injury was not "incident to service" – and thus his suit would not be *Feres*-barred – because its connection to the plaintiff's military status was "largely coincidental," even though, as in *Costo*, the benefit was available to the plaintiff only because of his military status and he was subject to military rules and discipline during the recreational outing. *Id.* at 644–45;* *see also Kelly v. Panama Canal Comm'n*, 26 F.3d 597, 599–600 (5th Cir. 1994) (permitting a claim stemming from an accident that occurred in a boat rented from an on-base marina, because the service member was off-duty and off-base when injured).

The Federal Reports are replete with cases demonstrating the challenges lower courts face in applying the imprecise doctrine in a fair and consistent manner. For example, the Third Circuit held that the murder of a female Naval officer, which occurred while she was sitting in her living room watching a movie with a friend, occurred "incident to service" because she lived on base and her assailant (a former fiancé) also was a Naval officer. *See O'Neill v. United States*, 140 F.3d 564, 565 (3d Cir. 1998) (Becker, C.J., statement sur denial of the petition for rehearing) ("[I]t is difficult for me to imagine anything less incident to service than being attacked by an ex-lover while sitting at home watching a movie with a friend. Surely, Smith would have killed O'Neill even if she

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* The issue resolved in that case was the indemnity action by the civilian boat manufacturer against the government. That claim would have been barred under *Stencel Aero Engineering Co. v. United States*, 431 U.S. 666 (1977), if the underlying tort claim were *Feres*-barred.

was a civilian at the time."). And the Tenth Circuit has held that injures suffered during a beating by gang members occurred "incident to service" and the claims were therefore *Feres*-barred, because the gang members had been loitering in the parking lot of an on-base NCO club. *See Pringle v. United States*, 208 F.3d 1220, 1222, 1227 (10th Cir. 2000).

The Ninth Circuit, in contrast, permitted an active-duty Air Force officer to proceed with her tort claim for injuries suffered when other Air Force members broke into her office, stole personal correspondence, and disseminated it in an effort to damage her reputation, because those injuries did not occur "incident to service." *See Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1488 (9th Cir. 1991). Likewise, the Eighth Circuit permitted an African-American National Guardsman to sue the government after he lapsed into a deep depression and shot himself because fellow soldiers subjected him to a "mock lynching" at an on-base party, behavior that the court felt could not serve any conceivable military purpose and was therefore not "incident to service." *Brown v. United States*, 739 F.2d 362, 369 (8th Cir. 1984). The Tenth Circuit similarly refuses to apply a *Feres* bar to suits seeking compensation for conduct that involves a "distinctly nonmilitary act." *E.g.*, *Durant v. Neneman*, 884 F.2d 1350, 1354 (10th Cir. 1989) ("When military personnel are engaged in distinctly nonmilitary acts, they are acting, in effect, as civilians and should be subject to civil authority.").

**3.** The widely contrasting results reached in the lower courts' efforts to apply the *Feres* doctrine have given rise to absurdities and rank inconsistencies. In two cases reaching opposite conclusions, the distinction between being *Feres*-barred and having access to

recovery appeared to rest on the difference between a long weekend and a normal commute. *Compare Parker v. United States*, 611 F.2d 1007, 1015 (5th Cir. 1980) (holding that *Feres* did not bar suit by a service member's family for his death, which occurred when he was hit by a military vehicle while driving on an army-maintained road within Fort Hood, because he was leaving the base for a four-day weekend and therefore the injury was not incident to service), *with Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999) (barring recovery when service member was killed while driving home from work when his private vehicle was broadsided by a five-ton military truck on a public highway that runs through Fort Knox Army Base). In reaching that unjust result in *Richards*, the Third Circuit was fully aware of the illogic and inequity of its ruling. *See id.* at 657–58 ("[W]e are left with a counter-intuitive and inequitable result simply because of Private Richard's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it. Again, we express concern and note that the result we reach does not actually advance the philosophy behind *Feres*.") (citations omitted). *Richards*, in turn, is impossible to reconcile with *Schoenfeld*, in which the Ninth Circuit held that *Feres* did not bar a claim by an active-duty service member injured in a car accident on base because he was on liberty for the weekend and riding in a car on a road open to use by the public.

In sum, the *Feres* doctrine is devoid of any statutory support and lacks meaningful foundational principles to guide courts in applying it consistently to new fact patterns. The widely divergent outcomes in

these cases are entirely inexplicable by reference to any of the plausible justifications for *Feres*.

### C. Courts Of Appeals Repeatedly Lament The Inequities Caused By *Feres* And *Johnson* And Urge This Court To Relieve Them Of The Untenable Burden Of Implementing An Incoherent And Unjust Doctrine

This Court's authority to construct jurisdictional bars premised on public policy concerns is controversial. Courts in every circuit – including the courts below – have lamented the inequities and inconsistencies caused by the *Feres* doctrine, have challenged this Court's authority to adopt the extra-textual bar and the wisdom of the policies underlying the Court's continued adherence to it, and have urged this Court to reconsider *Feres*.

Respected circuit judges have forthrightly questioned this Court's authority to craft the *Feres* bar out of whole cloth. *See Taber*, 67 F.3d at 1038–39 (Calabresi, J.) ("That such a reading of the FTCA was exceedingly willful, and flew directly in the face of a relatively recent statute's language and legislative history, apparently did not trouble the Court much – intent, as it was, to make the FTCA 'fit' the legal landscape of the time. . . . [The Court's] willingness to ignore language, history, and the process of incremental law making (not to mention possible ways of dialoguing with Congress to discern the legislature's actual intent) was . . . remarkable.") (citation omitted); *see also Costo*, 248 F.3d at 871 (Ferguson, J., dissenting) ("When considering the *Feres* doctrine, . . . we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute. . . . This judicial re-

writing runs against our basic separation of powers principles . . . ."); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (Noonan, J., concurring) ("The court . . . registers the unease caused by the judicial gloss on the congressional waiver of sovereign immunity."). *Cf. Rayonier Inc. v. United States*, 352 U.S. 315, 320 (1957) ("There is no justification for this Court to read exemptions into the [FTCA] beyond those provided by Congress.").

Lower courts also are troubled by the absence of credible rationales underlying the *Feres* doctrine. *See, e.g., Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundations upon which it stands. Prior panels of this court, of other courts of appeals, and numerous commentators have questioned the soundness of the *Feres* doctrine."); *Ruggiero v. United States*, 162 F. App'x 140, 142 (3d Cir. 2006) ("we have serious concerns about the analytical underpinnings of the *Feres* doctrine"); *Costo*, 248 F.3d at 866 ("These policy justifications and the doctrine itself have been heavily criticized by commentators and by this Court."); *Day*, 167 F.3d at 683 ("[a] few of *Feres*'s original reasons no longer seem so persuasive"); *Estate of McAllister v. United States*, 942 F.2d 1473, 1476, 1480 (9th Cir. 1991) ("A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales. . . . In [affirming the district court], we follow a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine.") (citations omitted); *Persons*, 925 F.2d at 299

("[i]t would be tedious to recite, once again, the countless reasons for feeling discomfort with *Feres*").

Courts and scholars also have criticized the unprincipled expansion of the *Feres* doctrine to circumstances far beyond those contemplated by this Court in *Feres* and *Johnson*. *See, e.g.*, *Overton v. New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 100 (2d Cir. 2004) (Pooler, J., concurring) ("I write separately to warn against an undisciplined expansion of the *Feres* doctrine. . . . The application of *Feres* in collateral areas of military governance produces the most vivid examples of doctrinal over-reach."); *Richards v. United States*, 180 F.3d 564, 564–65 (3d Cir. 1999) (Rendell, J., dissenting from denial of rehearing en banc) ("This case presents yet another compelling argument for the abandonment of the *Feres* doctrine. *Feres* . . . is being employed by many courts on a regular basis to deny a military employee's recovery, and to prevent the government's accountability, for injuries sustained in connection with essentially civilian activities wholly unrelated to military service.") (citations omitted).

And courts – such as the district court below – lament time and again the inequities of barring tort recovery for service members simply by virtue of their status as active-duty military personnel. *See* App. 7a ("Several noted jurists and academics have raised objection to the *Feres* doctrine, and its application to this case seems particularly unfair.") (citations omitted); *see also McConnell*, 478 F.3d at 1098 ("[W]e note that we apply the *Feres* doctrine without relish.") (internal quotation marks and citation omitted); *Ruggiero*, 162 F. App'x at 143 ("We have no choice but to apply *Feres* to the instant case, despite the harshness of the result and our concern about the

doctrine's analytical foundations."); *Richards*, 176 F.3d at 657 ("Thus, we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Uhl v. Swanstrom*, 79 F.3d 751, 755 (8th Cir. 1996) ("[W]e find ourselves equally reluctant, yet legally bound, to hold that plaintiff's claims in the present case are nonjusticiable under the *Feres* doctrine."); *Miller v. United States*, 42 F.3d 297, 307–08 (5th Cir. 1995) ("The law is often unfair when viewed from the perspective of any one individual. Unfairness, however, must often be tolerated if we are to devise, implement, and maintain a system of laws whose application is certain and just in the grand scheme of things. Whether the *Feres* doctrine can be described as such is, we feel, open to question in certain cases."). The Eighth Circuit has gone so far as to appeal directly to the parties to rectify the injustice that resulted when it was compelled to bar a service member's claim under *Feres*. *See Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) ("We take the liberty of urging, however, that the defendant, if it believes that some negligence may actually have occurred here, consider what steps can be appropriately taken to help the plaintiff. This is the kind of suggestion we rarely make, and it of course is not binding on anyone, but we hope it will be heeded.").

Finally, many lower courts have taken the extraordinary measure of urging this Court to reconsider its continued adherence to its misguided decision in *Feres*. *See* App. 7a ("The Court further . . . [pleads] that now is the time to revisit the *Feres* doctrine.");

*see also McConnell*, 478 F.3d at 1098 (Gould, J., concurring) ("[M]any might welcome the Supreme Court's clarification of the doctrine's application in the case of military-sponsored recreational programs."); *Richards*, 180 F.3d at 565 (Rendell, J., dissenting from denial of rehearing en banc) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*"); *O'Neill*, 140 F.3d at 565 (Becker, C.J., statement sur denial of the petition for rehearing) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."). Doubtless no other precedent of this Court inspires such expressions among lower-court judges.

## II. THE LOWER COURTS STRUGGLE TO APPLY *FERES* BECAUSE IT WAS WRONGLY DECIDED

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). In *Feres*, this Court created a non-textual exception to governmental liability under the FTCA, ignoring or making redundant several statutory provisions in the process. Although a closely divided Court reaffirmed *Feres* in *Johnson*, the Court has largely abandoned the original justifications for the *Feres* doctrine. And rationalizations for *Feres* offered in subsequent cases no longer withstand scrutiny. The lack of textual guidance and the shifting, unpersuasive rationales have made it impossible for lower courts to implement the *Feres* doctrine consistently and fairly.

### A. The *Feres* Doctrine Is Inconsistent With The FTCA's Text

The notion that Congress did not intend to waive the government's immunity from suits by active-duty military personnel finds no support in the FTCA's plain text. In fact, as Justice Scalia's dissent in *Johnson* explains, the statutory text indicates that Congress intended the Act to "render[] the United States liable to *all* persons, including servicemen." 481 U.S. at 693 (Scalia, J., dissenting).

The fact that Congress specifically considered and provided for the special requirements of the military indicates that it did not intend a flat, incident-to-service bar. *See id.* The FTCA confers general jurisdiction over tort claims against the U.S. government and includes "members of the military or naval forces of the United States" in its definition of federal employees and "the military departments" in its definition of federal agencies. 28 U.S.C. § 2671. The FTCA then enumerates a number of explicit exceptions, but nowhere precludes all suits brought by military personnel. *Id.* § 2680. Instead, the FTCA contains two limited exceptions that maintain governmental immunity for a subset of tort claims by members of the military: those arising out of "the combatant activities of the military or naval forces, or the Coast Guard, *during time of war*" and those "arising in a foreign country." *Id.* § 2680(j), (k) (emphasis added). As this Court reasoned in *Brooks v. United States*, 337 U.S. 49 (1949), the express FTCA exceptions are "too lengthy, specific, and close to the present problem" to support an inference that, notwithstanding the literal language of the statute, Congress intended to bar all suits brought by servicemen. *Id.* at 51. "The overseas and combatant activities exceptions

make this plain." *Id.* A third provision, not discussed in *Brooks*, excludes claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

Together, these exceptions indicate Congress's intent to protect the military's autonomy and independence in areas in which lawsuits by service members could do the most harm – where injuries were incurred during combat, in operations overseas, or due to command decisions – but to permit suits to be brought against the military when these factors are not present. *See, e.g., Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988) (per Scalia, J.) (exempting military contractors from tort liability based on the discretionary function exception to the FTCA rather than relying on *Feres*).

### B. The Court's Extra-Textual Policy Justifications For The *Feres* Doctrine Cannot Displace Congressional Intent And, In Any Event, Are Unpersuasive

In *Feres*, this Court acknowledged the lack of textual support for a blanket bar on tort suits by military personnel, but nonetheless created such a bar by "construing [the FTCA] to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." 340 U.S. at 139. Thus, the Court's creation of a blanket bar was premised on its perception of sound policy, not on Congress's enactment of that policy. *See Johnson*, 481 U.S. at 692 (Scalia, J., dissenting) ("As it did almost four decades ago in *Feres* . . . , the Court today

provides several reasons why Congress might have been wise to exempt from the [FTCA] certain claims brought by servicemen. The problem now, as then, is that Congress not only failed to provide such an exemption, but quite plainly excluded it.").

The *Johnson* majority reaffirmed the *Feres* doctrine, again without relying on the FTCA's text or legislative history. Instead, the majority attempted to salvage three policy justifications from the tarnished *Feres* opinion. *See* 481 U.S. at 688 ("This Court has emphasized three broad rationales underlying the *Feres* decision."). Nonetheless, the dissent in *Johnson* effectively refuted each justification retained by the *Johnson* majority. *See id.* at 695 (Scalia, J., dissenting) ("[T]he *Feres* rule is now sustained only by three disembodied estimations of what Congress must (despite what it enacted) have intended. They are bad estimations at that."). Lower courts and scholars similarly have eviscerated the policy grounds on which this Court based its reaffirmance of the *Feres* doctrine. *See supra* pp. 18–22.

There is no need to retread those refutations in detail in this petition – a summary suffices to convey their credence. The first policy rationale retained in *Johnson* was premised on the "distinctively federal" nature of the relationship between the government and members of the armed services. The *Johnson* majority concluded that Congress could not have intended the FTCA to apply to active-duty service members because it would be unfair for the service member's recovery to turn on the tort law of the state where he was injured, a matter outside of his control. *See* 481 U.S. at 689. About this reasoning, the dissent simply observed, "[t]he unfairness to servicemen of geographically varied recovery is, to speak bluntly,

an absurd justification, given that . . . nonuniform recovery cannot possibly be worse than (what *Feres* provides) uniform nonrecovery." *Id.* at 695–96 (Scalia, J., dissenting). The majority also suggested that the "distinctively federal" nature of the military relationship justified the *Feres* bar to promote the uniform application of federal law to apply to service members' suits. *Id.* at 689. The dissent, however, pointed out that this Court has "effectively disavowed this 'uniformity' justification – and rendered its benefits to military planning illusory – by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting *civilians* to recover for injuries caused by military negligence." *Id.* at 696 (Scalia, J., dissenting).

The *Johnson* Court's second justification for reaffirming the *Feres* bar was "the existence of . . . generous statutory disability and death benefits" for injured military personnel. *Id.* at 689. As the *Johnson* dissent made clear, however, "[t]he credibility of this rationale is undermined severely by the fact that both before and after *Feres* [the Court] permitted injured servicemen to bring FTCA suits, *even though they had been compensated under the [Veteran's Benefits Act].*" *Id.* at 697 (Scalia, J., dissenting). "In sum, 'the presence of an alternative compensation system [neither] explains [n]or justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable.'" *Id.* at 698 (Scalia, J., dissenting) (quoting *Hunt v. United States*, 636 F.2d 580, 598 (D.C. Cir. 1980)).

Finally, the *Johnson* Court invoked the special status of the military as a justification for reaffirming the *Feres* bar, indicating that courts are ill-equipped to inquire into military decision-making and that

attempting to do so could have a negative effect on military discipline. *See id.* at 690–91. Although that argument retains a superficial appeal, it is both over- and under-inclusive. Many suits – such as medical malpractice suits – brought by active-duty military personnel can be resolved without intrusion into uniquely military affairs. Indeed, the principal anomaly of the *Feres-Johnson* approach is that federal courts routinely resolve medical malpractice claims against the government for injuries suffered in military hospitals because *Feres* does not bar the claims of veterans or civilian dependents of military personnel. *See United States v. Brown*, 348 U.S. 110 (1954); *Del Rio*, 833 F.2d at 286; *see also Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (discussing the anomaly).

Furthermore, outside the realm of tort suits against the military, the federal judicial system is often called upon to review military issues in areas in which the court's inquiry is arguably far more intrusive than in an injury lawsuit. For instance, federal courts review court-martial proceedings in habeas. *See, e.g., Burns v. Wilson*, 346 U.S. 137, 142 (1953). Likewise, when soldiers bring claims for injunctive or declaratory relief from statutory and constitutional violations, the courts review military decision-making, often in great detail. *See* Uniform Code of Military Justice, 10 U.S.C. § 938 (providing complaint procedure for "[a]ny member of the armed forces who believes himself wronged by his commanding officer"); *see also Colson v. Bradley*, 477 F.2d 639 (8th Cir. 1973). Similar judicial oversight occurs when the Court of Federal Claims reviews cases involving interference with military career advantage. *See* 28 U.S.C. § 1491.

Nor is the *Feres* bar justified by solicitude for the importance of military discipline. *See Johnson*, 481 U.S. at 699 (Scalia, J., dissenting). Congress accounted for this important concern in the FTCA's text itself, creating an exception to the broad waiver of immunity for claims arising out of combatant activities, 28 U.S.C. § 2680(j), and in foreign countries, *id.* § 2680(k). In addition, the FTCA contains a general exception for discretionary actions. *Id.* § 2680(a); *see* Major Diedre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 6, 60–72 (2007) (discussing FTCA exceptions that apply to military personnel). The discretionary-action exception, in particular, protects government agents whose actions "involved the exercise of discretion in furtherance of public policy goals." *United States v. Gaubert*, 499 U.S. 315, 334 (1991). That textual exception protects even low-ranking personnel from having their orders second-guessed in court, while permitting service members with injuries caused outside the context of a discretionary decision to recover. *See* Brou, 192 MIL. L. REV. at 66–67.

Finally, as Justice Scalia has pointed out, while courts have assumed that Congress intended to protect discipline by preventing service members from bringing suits, it is entirely possible that "Congress thought that *barring* recovery by servicemen might adversely affect military discipline." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). After all, the effect of seeing a fellow service member's family denied compensation could reasonably be thought to hurt a unit's morale and cohesion. *See id.*

*Feres* was wrongly decided, and the Court should not have reaffirmed it in *Johnson*. The Court should grant certiorari to remedy those errors.

## III. THE CONTINUED VIABILITY OF THE *FERES* BAR AFTER *JOHNSON* IS AN ISSUE OF EXCEPTIONAL IMPORTANCE

The *Feres* doctrine has caused widespread confusion. Courts vary widely in classifying what acts constitute incident to service, how to determine if a service member is off-duty or on-duty, and which family members are covered by the *Feres* doctrine. Moreover, the inconsistencies and entreaties for this Court's reconsideration are increasing, not diminishing.

The frequency with which lower courts are required to apply *Feres* demonstrates the pressing need for this Court to bring clarity to the law. In addition to the present case, over the past three years, appeals courts have considered *Feres* doctrine cases at least 14 times. *See, e.g.*, *Wetherill v. Geren*, 616 F.3d 789 (8th Cir. 2010) (*Feres* bar to Title VII suit brought by a dual-status technician), *petition for cert. filed*, 79 U.S.L.W. 3310 (Nov. 9, 2010) (No. 10-638); *Bowers v. Wayne*, 615 F.3d 455 (6th Cir. 2010) (*Feres* bar to various discrimination claims brought by dual-status Air Force employee); *Zuress v. Donley*, 606 F.3d 1249 (9th Cir. 2010) (*Feres* bar to Title VII suit brought by a dual-status technician), *petition for cert. filed*, 79 U.S.L.W. 3149 (Sept. 16, 2010) (No. 10-374); *Payne v. United States*, 360 F. App'x 727 (8th Cir. 2010) (unpublished decision) (*Feres* bar to suit based on injuries incurred resulting from exposure to Agent Orange); *Brown v. United States*, 583 F.3d 916 (6th Cir. 2009) (*Feres* bar to family members for medical malpractice claim based on improper diagnosis of a parasitic infection in veteran); *Lovely v. United States*, 570 F.3d 778 (6th Cir. 2009) (*Feres* bar to claim of intentional infliction of emotional distress

brought by a member of the ROTC), *cert. denied*, 130 S. Ct. 1054 (2010); *Walsh v. United States*, 328 F. App'x 806 (3d Cir.) (unpublished decision) (*Feres* bar to claim based on negligence in failing to investigate arsenic poisoning), *cert. denied*, 130 S. Ct. 502 (2009); *Matthew v. United States*, 311 F. App'x 409 (2d Cir.) (unpublished decision) (*Feres* bar to suit for injuries arising from exposure to radioactive depleted uranium), *cert. denied*, 130 S. Ct. 101 (2009); *Williams v. Wynne*, 533 F.3d 360 (5th Cir. 2008) (*Feres* bar to Title VII claim brought by a dual-status technician); *Walch v. Adjutant Gen. Dep't*, 533 F.3d 289 (5th Cir. 2008) (*Feres* bar to Title VII and 42 U.S.C. §§ 1983 and 1985 claims brought by a dual-status technician); *Regan v. Starcraft Marine, LLC*, *supra* (no *Feres* bar to suit arising from injury during a recreational boating trip using Army facilities); *Geiger v. United States*, 266 F. App'x 688 (9th Cir. 2008) (unpublished decision) (*Feres* bar to suit for injury arising from alleged negligence in an automobile accident); *Diaz-Romero v. Mukasey*, 514 F.3d 115 (1st Cir. 2008) (*Feres* bar to various discrimination claims from employee of the Public Health Service, which qualifies as a uniformed service of the United States); *Willis v. Roche*, 256 F. App'x 534 (3d Cir. 2007) (unpublished decision) (*Feres* bar to Title VII claim brought by a dual-status technician).

This steady stream of cases is evidence that *Feres* and its progeny have failed to bring certainty or even predictability to this area. When the courts of at least one circuit make determinations of whether a claim must be barred by merely drawing analogies with the facts of previous cases, *see Schoenfeld*, 492 F.3d at 1019, it is no wonder that the issue is litigated and appealed over and over again. Without

clearer guidance, injured service members will continue to bring claims that ultimately will be barred, the government will continue to challenge claims that ultimately will be granted, and judges will continue to decry an unjust and unprincipled precedent of this Court. Such effects cause substantial damage to the justice system.

## IV. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO REVISIT *FERES* AND *JOHNSON*

This case represents an excellent opportunity for this Court to reconsider, revise, or overrule *Feres*. The facts of the case are not in dispute. In particular, the gross negligence of the medical personnel responsible for SSgt. Witt's injuries was independently established and is uncontroverted. Only the *Feres* exception prevents petitioner from pursuing her claim against the government for the death of her husband caused by the government's negligence. Both the district court and the court of appeals expressly recognized the substantial injustice arising out of applying the *Feres* doctrine in this case. The district court called its application of the *Feres* doctrine "unfair," "irrational," and "inequitable," App. 7a, and the court of appeals noted that the circumstances underlying the lawsuit were "tragic," App. 2a.

Moreover, this case raises issues that fully implicate the many compelling criticisms of the Court's continued adherence to the *Feres* doctrine. SSgt. Witt was not engaged in any military activities when he was injured. At the time he was diagnosed with appendicitis, SSgt. Witt was moving to California under a Permanent Change of Station Order. He was between assignments on a protracted leave, had no official military duties, was not assigned to a particular unit, and was not scheduled to report for duty

until 20 days after his injury. The medical negligence claims underlying this suit are typical of claims brought by private parties under similar circumstances. SSgt. Witt's injuries are related to his military status only tangentially, and review of petitioner's claims would not require the courts to inquire into military affairs or undermine military discipline. Moreover, if Mrs. Witt or SSgt. Witt's dependents had been injured in the same hospital in precisely the same manner, they would have been able to pursue claims against the government under the FTCA.

In addition to being an appropriate vehicle for this Court to consider overruling *Feres*, this case would also allow the Court to reconsider *Feres* in a narrower way, by defining two important limitations on the *Feres* bar to recovery. First, the Court could clarify how a service member's leave status at the time of his injury affects whether his claim is barred, thus resolving one circuit split. *Compare Harvey v. United States*, 884 F.2d 857, 861 (5th Cir. 1989) (allowing suit for service member on leave), *with Madsen v. United States ex rel. U.S. Army, Corps of Eng'rs*, 841 F.2d 1011, 1012, 1014 (10th Cir. 1987) (barring suit for service member on leave).

Second, this case would allow the Court to consider whether medical malpractice claims should continue to be barred under *Feres*. The claims considered in *Feres* itself included two medical malpractice claims. *See* 340 U.S. at 137. But at least one of the rationales on which that decision rested has been rejected, and the rationale emphasized in *Johnson* – the preservation of military discipline – would seem to have little relation to medical malpractice claims. The Court thus could exclude medical malpractice cases from the *Feres* doctrine if it chose not to overturn *Feres* completely.

The issue presented in this case would not benefit from further percolation in the lower courts. The numerous ramifications of the *Feres* doctrine have been fully analyzed and criticized by lower courts and commentators. Since the Court reaffirmed *Feres*, the doctrine has become even more unworkable than it was when a bare majority upheld it in *Johnson*. At the same time, its frequent application has generated ever-greater confusion and injustice. This Court created the *Feres* doctrine, and the time is ripe for this Court to overrule it.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 7, 2011

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**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15339

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
*Plaintiff-Appellant*,

v.

UNITED STATES OF AMERICA,
*Defendant-Appellee*.

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding
D.C. No. 2:08-cv-02024-JAM-KJM

Argued and Submitted May 11, 2010
San Francisco, California

[Filed May 14, 2010]

MEMORANDUM*

Before: SILVERMAN, FISHER and M. SMITH, Circuit Judges.

Alexis Witt appeals the district court's dismissal of her wrongful death action under the Federal Tort Claims Act (FTCA), alleging that her husband, a

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

member of the Air Force, died as the result of negligent medical treatment in a military hospital.

In *Feres v. United States*, the Supreme Court established an exception to the FTCA's waiver of sovereign immunity "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. 135, 146 (1950). We have consistently held that claims for medical malpractice in military facilities are barred by *Feres*. *See, e.g., Persons v. United States*, 925 F.2d 292, 296 (9th Cir. 1991); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980). Although Witt's husband may have been on some form of leave when the injury occurred, duty status is only one factor in the analysis. *See Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001). Moreover, we have specifically held that *Feres* applies even when service members were off duty, emphasizing that they received care in a military hospital based on their status as service members. *See, e.g., Persons*, 925 F.2d at 296; *Veillette*, 615 F.2d at 507. The same analysis controls the present case.

Although we acknowledge the tragic circumstances underlying this lawsuit, we are bound by precedent of the Supreme Court and our court to affirm the district court's dismissal.

The parties shall bear their own costs.

**AFFIRMED.**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Case No. 2:08-CV-02024 JAM-KJM

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
*Plaintiff*,

v.

UNITED STATES OF AMERICA,
*Defendant*.

[Filed Feb. 10, 2009]

ORDER GRANTING MOTION TO DISMISS

Alexis Witt ("Plaintiff") brought this action against the United States of America ("Defendant"), on behalf of the Estate of Dean Witt, her deceased husband, for medical negligence. Defendant filed a Motion to Dismiss for Lack of Jurisdiction. Plaintiff opposed the Motion. For the reasons stated below, Defendant's Motion to Dismiss is GRANTED.[1]

BACKGROUND

On October 10, 2003, SSgt. Dean Witt ("Witt") was admitted to David Grant Medical Center at Travis Air Force Base for acute appendicitis. Compl. ¶ 6.3. Plaintiff alleges that as a result of negligent post-operative care, Witt experienced a lack of oxygen that caused severe damage to his brains and other organs and left him in a permanent vegetative state.

[1] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 78-230(h).

*Id.* ¶ 6.4. Witt was removed from life support and died on January 9, 2004. *Id.*

On August 28, 2008, Plaintiff brought this action against Defendant for medical negligence. Docket at 1.

## OPINION

Rule 12(b)(1) permits a Defendant to seek dismissal of an action for lack of subject-matter jurisdiction. Defendant argues that this Court lacks subject-matter jurisdiction because Defendant is immune from suit in this matter under the doctrine of sovereign immunity.

"The [Federal Tort Claims Act] waives traditional sovereign immunity for the tortious conduct of any Government employee." *Persons v. United States*, 925 F.2d 292, 294 (9th Cir. 1991). However, "the Supreme Court has carved out an exception for 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.'" *Id.* (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

The Ninth Circuit has repeatedly found that injury due to medical malpractice in military hospitals is "incident to service." *See, e.g., Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997) (hand injury); *Hata v. United States*, 23 F.3d 230, 235 (9th Cir. 1994) (heart attack); *Estate of McAllister v. United States*, 942 F.2d 1473, 1477-79 (9th Cir. 1991) (negligent supervision of mentally ill service member); *Persons*, 925 F.2d at 296 (suicide); *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987) (prenatal care); *Veillette v. United States*, 615 F.2d 505, 507 (9th Cir. 1980) (motorcycle accident). This is true even when the underlying injury did not occur

during active duty.[2] *See Jackson*, 110 F.3d 1484, 1489 (9th Cir. 1997) ("[W]e have held that *Feres* bars suits for medical malpractice even when the treatment was not for military-related injuries.").

Plaintiff's reliance on cases where service members sued for medical malpractice based on care to dependent spouses and children at military hospitals is misplaced. When active duty service members bring suit for medical malpractice based on care received by their dependants, the *Feres* doctrine is not implicated. The simple fact that active duty service members can bring suit under the FTCA in some circumstances does not mean that they can bring suit when their injuries are incident to service under current precedent. *See Veillette*, 615 F.2d at 507 ("Although the fact that civilians are admitted to the hospital indicates that Veillette was not treated there solely because of his status, it does not follow that Veillette's treatment there was not incident to his military service.").

Plaintiff's reliance on the public policy rationale behind the *Feres* doctrine is also misplaced. Plaintiff states that the Court is required to consider the public policy factors behind *Feres*. Although in a case cited by Plaintiff, *Del Rio v. United States*, 833 F.2d 282, 288 (11th Cir. 1987), the Eleventh Circuit looked to the *Feres* policy rationales, the Ninth Circuit has specifically "shied away from attempts to apply these policy rationales." *Costo v. United States*, 248 F.3d 863, 867 (9th Cir. 2001). Instead, the Ninth

---

[2] Because Plaintiff received treatment in a military hospital by virtue of the fact that he was a service member, his duty status is not relevant in determining whether his injury was incident to service. *See Persons v. United States*, 925 F.2d at 296, *see also Veillette*, 615 F.2d at 507.

Circuit has outlined four factors to be considered in determining whether a suit should be barred by the *Feres* Doctrine:

> 1) the place where the negligent act occurred; 2) the duty status of the plaintiff when the negligent act occurred; 3) the benefits accruing to the plaintiff because of his status as a service member; and 4) the nature of the plaintiff's activities at the time the negligent act occurred.

*Id.* However, the purpose of applying this four factor test is to determine whether or not the service member's activity was incident to service. Because the Ninth Circuit has repeatedly stated that injury due to medical malpractice at a military hospital is incident to service, the Court need not go through each of the four factors. *See Hata*, 23 F.3d at 235 ("The Ninth Circuit has consistently barred as 'incident to service' claims arising out of medical care provided to service members in military hospitals.").

Finally, Plaintiff challenges the *Feres* Doctrine itself, arguing that it violates the equal protection clauses of Fifth and Fourteenth Amendments and the separation of powers doctrine. The Ninth Circuit has considered and rejected these arguments. *See Costo v. United States*, 248 F.3d 863 (9th Cir. 2001).

The alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that this Court should allow this claim in spite of *Feres*. A 25 year old man who devoted his life to serving his country is dead through no fault of his own and his widow can not sue to recover for her loss. Instead, she is limited to a fraction of the recovery she might otherwise have received because of the *Feres* doctrine. *See United*

*States v. Johnson*, 481 U.S. 681, 703 (1987) (Scalia, J. dissenting). Several noted jurists and academics have raised objection to the *Feres* doctrine, *see, e.g.*, *Costo*, 248 F.3d at 869 Ferguson, J. dissenting); *Johnson*, 481 U.S. at 692 (Scalia, J. dissenting), and its application to this case seems particularly unfair. However, as wrong-headed as it may seem, this Court is duty-bound to follow precedent and abide by the decisions of the Ninth Circuit and Supreme Court. The Court encourages the Ninth Circuit to consider the *Feres* Doctrine en banc, especially in light of the inequitable result of its application in this case. *See Costo*, 248 F.3d at 869 ("[W]e join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes."). The Court further joins in Judge Ferguson's plea to the Supreme Court in *Costo*, that now is the time to revisit the *Feres* doctrine. Otherwise, *Feres* will once again have led to a result that can only be characterized as unfair and irrational.

ORDER

For the reasons stated above, Defendant's Motion to Dismiss is, reluctantly, GRANTED.

IT IS SO ORDERED.

Dated: February 9, 2009

/s/ JOHN A. MENDEZ
JOHN A. MENDEZ
UNITED STATES DISTRICT JUDGE

[Seal Omitted]

**DEPARTMENT OF THE AIR FORCE**

**HEADQUARTERS AIR FORCE LEGAL OPERATIONS AGNECY**

[Mar. 7, 2008]

HP AFLOA/JACC
1501 Wilson Blvd., Ste 835
Arlington, VA 22209-2403

Matthew L. Mitton
Jones, Waldo, Holbrook &
McDonough, P.C.
170 S. Main Street, Suite 1500
Salt Lake City, UT 84101

Re: Medical Malpractice Claim of Alexis Witt
Air Force Claim No: Travis Air Force Base
05-687

Dear Mr. Mitton

I have considered Mrs. Witt's claim alleging negligence by SSgt Dean Witt's providers at David Grant Medical Center, Travis Air Force Base, California under the provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b); 2671-2680. Before proceeding, I wish to extend to Ms. Witt and SSgt Witt's family, personally and on behalf of the Air Force, our most profound sympathy for the unimaginably tragic loss of SSgt Witt. The magnitude of the death of a husband and father of two young children is beyond measure and beyond the power of mere words to weigh. His honorable and dedicated service has earned the eternal gratitude of the Air Force and his

nation. However, the law allows me no other choice but to deny Mrs. Witt's claim.

SSgt Witt was on active duty with the Air Force at all times that he received the medical care that is the subject of this claim. Thus, his care is considered to have been rendered "incident to service," and, under the rule established in the case of *Feres v. United States*, 340 U.S. 135 (1950), any claim arising from such care is barred. The "incident to service" bar of medical malpractice claims and lawsuits has consistently been applied since the *Feres* decision. *Jones v. United States*, 112 F.3d 299 (7th Cir. 1997); *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987); *Estate of McCallister v. United States*, 942 F.2d 1473 (9th Cir. 1991), *cert. denied* 112 S.Ct. 1164 (1992). The *Feres* bar also applies to claims by family members of an active duty service member that arise out of care rendered to the service member. *United States v. Shearer*, 473 U.S. 52 (1985); *Hata v. United States*, 23 F.3d 230 (9th Cir. 1994).

This is the final denial of your client's claim. I am required to inform you that if she is dissatisfied with this decision, you may file suit in an appropriate United States District Court not later than six months after the date of the mailing of this letter.

Sincerely

/s/ HILDEGARDE CONTE PERLSTEIN
HILDEGARDE CONTE PERLSTEIN
Chief Medical Law Branch
Claims & Tort Litigation Division
Air Force Legal Operations Agency

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 09-15339

ALEXIS WITT,
ON BEHALF OF THE ESTATE OF DEAN WITT, DECEASED,
*Plaintiff-Appellant,*

v.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

[Filed Aug. 11, 2010]

ORDER

Before: SILVERMAN, FISHER and M. SMITH, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and request for rehearing en banc.

The full court has been advised of the request for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellant's petition for rehearing and request for rehearing en banc, filed June 28, 2010, is **DENIED**.

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act provide:

### 28 U.S.C. § 1346. United States as defendant

* * * * *

**(b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

### 28 U.S.C. § 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

**28 U.S.C. § 2680. Exceptions**

The provisions of this chapter and section 1346(b) of this title shall not apply to—

* * * * *

**(a)** Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

**(j)** Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

**(k)** Any claim arising in a foreign country.

* * * * *

**Supreme Court of the United States**
**Office of the Clerk**
**Washington, DC 20543-0001**

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

November 4, 2010

Mr. David C. Frederick
Kellogg, Huber, Hansen,
Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036

Re: Alexis Witt, on Behalf of the Estate of Dean Witt, Deceased v. United States
Application No. 10A441

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on November 4, 2010 extended the time to and including January 7, 2011.

This letter has been sent to those designated on the attached notification list.

Sincerely,

**William K. Suter**, Clerk
by /s/ Jeffrey Atkins

Jeffrey Atkins
Supervisor-Case Analyst
Division

[attached notification list omitted]